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IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1974
No. 73-434

RONALD BRADLEY, et al.,

Petitioners,

vs.

WILLIAM G. MILLIKEN, et al.,

Respondents.

ON APPEAL FROM
THE SIXTH CIRCUIT COURT OF APPEALS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL SUBURBAN LEAGUE, LTD., AMICUS CURIAE, IN SUPPORT OF PETITIONERS

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National Suburban League, Ltd.

February 19, 1974

IN THE

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RONALD BRADLEY, et al.,

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TO: THE SUPREME COURT OF THE UNITED STATES.

HAROLD H. FUHRMAN respectfully moves for an order granting leave to file a brief amicus curiae in the above-entitled case pursuant to Rule 42 of the Revised Rules of this Court. Consent of the petitioners and respondents has been refused.

1. Movant's interest in the case is: the National Suburban League, Ltd., is a non-profit corporation dedicated to the autonomy of suburban

municipalities and their constituents. If the ruling below is upheld, a serious blow will be dealt to local home rule and self-government. The boundaries of the school districts involved are coterminus with the boundaries of the related municipalities. The autonomy of the people of the suburban municipalities would be infringed in violation of the 10th Amendment to the Federal Constitution.

2. The Movant will brief the following issues:

I. Whether the order of the District Court, affirmed in part by the Sixth Circuit Court of Appeals, is a proper exercise of its judicial authority?

II. Whether such an order is appropriately directed at the defendants in this cause?

III. Whether, absent a showing of de jure segregation, qualitative and quantitative equality in education will be mandated?

3. Amicus curiae will benefit the Court by explaining four areas of law which, to its knowledge, will not be otherwise disposed of in other briefs. The first area of law is that the problem at issue is not one which may be determined by the judiciary when a legislative remedy is possible. The second area of law is that as such school districts are not made an automatic arm of the state certainly no court may so make them. The third area of law is that no de jure discrimination has been shown. Absent such a showing the court has never ruled in favor of establishing actual equality as a rule of law. No conscious balancing of either quantitative or qualitative equality has been attempted by the Court. The fourth area of law is the

reservation of rights to the states and the people under the Tenth Amendment. This Amendment to the Federal Constitution is the cornerstone of local autonomy for states and municipalities which must be acknowledged and revitalized. Thus amicus curiae will be of substantial aid in a determination of the case at law.

Dated February 19, 1974.

/s/ Harold H. Fuhrman
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BRIEF OF NATIONAL SUBURBAN LEAGUE, LTD., AMICUS CURIAE, IN SUPPORT OF PETITIONERS

INTRODUCTION

Interest of Amicus Curiae

The National Suburban League, Ltd., is a non-profit corporation which exists for the express purpose of articulating the needs of suburban municipalities. Its most important charter functions are: (a) to preserve and safeguard the independence, integrity, and home rule of suburban municipalities

against all forms of metropolitan encroachment; (b) to protect historic sources of revenue for suburban government; (c) to keep local government close, responsive, important, and meaningful to its citizens; (d) to provide a collective voice for all suburban citizens before state and national governments; and (e) to foster inter-municipal cooperation, especially among suburban municipalities.

If the ruling below is upheld, a serious blow will be dealt to local home rule and self-government. The boundaries of the school districts involved are coterminus with the boundaries of the related municipalities. The autonomy of the people of the suburban municipalities would be infringed in violation of the 10th Amendment to the Federal Constitution.

QUESTIONS PRESENTED

I. Whether the order of the District Court, affirmed in part by the Sixth Circuit Court of Appeals, is a proper exercise of its judicial authority?

II. Whether such an order is appropriately directed at the defendants in this cause?

III. Whether, absent a showing of de jure segregation, qualitative and quantitative equality in education will be mandated?

STATEMENT OF THE CASE

The Circuit Court of Appeals for the Sixth Circuit has a part of its opinion reported in Bradley v. Milliken, 484 F. 2d 216 (6th Cir. 1973), affirmed the order of the District Court in this matter, 345 F. Supp. 914, that a Detroit metropolitan area desegregation plan be developed in order to integrate the Detroit school system. Such a plan would involve the inter-district bussing of students between the Detroit school district and up to more than fifty suburban districts. The finding of de jure discrimination made by the District Court was upheld. The discrimination charged was from alleged gerrymandering of school districts, housing patterns and site selection of schools.

ARGUMENT

I.

THE ORDER OF THE DISTRICT COURT IS NOT A PROPER EXERCISE OF ITS JUDICIAL AUTHORITY.

A. THAT PORTION OF THE ORDER DEALING WITH INTER-DISTRICT BUSSING IS A DEROGATION OF THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF POWERS, IN THAT IT IS A JUDICIAL ENCROACHMENT ON A LEGISLATIVE FUNCTION.

The order of the District Court, affirmed by the Sixth Circuit Court of Appeals is, in effect, identical to an ordering of the consolidation of school districts or the revising of school district boundary lines. Such an order is, in the State of Michigan, within the exclusive power of the state

legislature. The Michigan Supreme Court has clearly established this proposition, as shown by its language in School District of Lansing v. State Board of Education, 367 Mich. 591, 595, 116 N. W. 2d 866 (1962):

> Unlike the delegation of other powers by the legislature to local governments, education is not inherently a part of the local self-government of a municipality except insofar as the legislature may choose to make it such. Control of our public school system is a State matter delegated and lodged in the State legislature by the Constitution.

An attempt by the judiciary to affirmatively order the alteration of school district boundaries, effectively if not explicitly in this case, thus infringes on the province of the legislature. Whether it is a state or federal court which attempts to do this is immaterial; the effect is the same, and the effect is one carefully guarded against in this country, as pointed out in 16 C.J.S. "Constitutional Law" Sec. 104 at 483 (1956):

> The separation of governmental powers into legislative, executive, and judicial is provided for in practically all the American state constitutions, and such provisions, in theory, effect an absolute separation of these departments. Indeed, constitutional government in the United States is distinguished by the care that has been exercised in committing the legislative, executive, and judicial functions to separate departments, and in forbidding any encroachment by one department on another in exercise of the authority so delegated.

The State of Michigan has acted within the provisions of the federal constitution in providing that its legislature shall control schools and school districts, as is shown by the following language:

> In other words, the Fourteenth Amendment of the federal Constitution leaves the states free to distribute the powers of government as they will between the various branches thereof.

Id. at 486 (footnote omitted). Further specific support of this proposition is given as follows:

> Matters that have been held within the scope of the legislative power, as distinguished from the powers of the judicial and executive departments, are the ascertainment of pertinent facts for legislation, the creation and regulation of municipal corporations, the creation and regulation of quasi corporations for governmental purposes, the establishment and reorganization of school districts, the fixing and changing of boundaries of subordinate governmental units such as county boundaries, and the authorizing of municipal aid to railroads.

Id. Sec. 107 at 493-94 (emphasis supplied and footnotes omitted). It is also noted from the same source that "[t]he general rule against judicial encroachment on the legislature's domain has also been applied with respect to . . . schools and school districts. . . ." Id. Sec. 151 (1) at 753-56.

An example of the application of this principle, and a demonstration that it is respected by federal courts relative to state legislatures is provided by Sparrow v. Gill, 304 F. Supp. 86 (M.D. N.C. 1969). That case dealt with a state statute which

provided, inter alia, a distinction between city and county pupils in the availability of school bus transportation. The court pointed out:

> We have held the city-county distinction a constitutionally valid one. Whether it would be better and fairer to abolish it and go to a measured-distance-from-school basis as urged by plaintiff is a political question for the people and their legislative representatives. It is not for us to answer, and we would exceed our jurisdiction were we to attempt it.

Id. at 91. Thus, the order of the District Court in the instant case is an intrusion by the judiciary into the law-making province of the legislature, the prohibition against which is pointed up in C.J.S., supra, Sec. 144 at 691-92:

> On the other hand, under the theory of the separation of powers the judiciary department must stay within the bounds of its constitutional power, and cannot exercise those powers which are to be found in the other two departments of government, such as powers which are normally legislative or powers which are generally executive in their nature, or powers which are, by specific constitutional provision, conferred on a department other than the judiciary. As distinguished from that primary function of the judiciary to declare what the law is, as noted earlier in this section, it is not a proper judicial function to determine what the law should be or to make laws. . . . (Footnotes Omitted.)

As noted above, the Michigan Constitution has specifically conferred control of schools and school districts upon the legislature.

B. THE ISSUE OF INTER-DISTRICT BUSSING IS A NON-JUSTICIABLE POLITICAL QUESTION.

The subject of political questions is discussed in C.J.S., supra, Sec. 145. It is there pointed out that it is not normally within the province of the judiciary to determine political questions and that the scope of the term includes those matters in regard to which full authority has been delegated to the legislature. Thus, the matter in question falls within the concept of political question, since it is within the province of the Michigan legislature. This is supported by the following general summary:

> [N]or do matters pertaining to the creation or boundaries of municipalities, addition of land thereto, or the detachment of land therefrom, ordinarily present questions for judicial determination. So, also, with respect to the formation and dissolution of school districts, the selection and location of county seats, and the making and correction of surveys of public land.

Id. at 706 (footnotes omitted).

Although there is occasional language found to the effect that the political question issue applies only to matters concerning conflicts among the branches of the federal government, the concept has been applied in numerous cases, such as the instant case, in which a federal court is considering a matter within the province of the state legislature. It therefore appears clearly established that the principle is applicable here, by analogy if not directly.

In the case of Detroit Edison Co. v. East China Township School District No. 3, 247 F. Supp. 296 (E.D. Mich. 1965), aff'd 378 F. 2d 225 (6th Cir. 1967), cert. denied 389 U.S. 932 (1967), property owners challenged the annexation of two school districts to the school district in which their property was located. The district court held that school district annexation procedures are purely legislative matters which are not justiciable under the due process or equal protection clauses of the federal constitution. The court discussed the matter relative to cases involving alteration of municipal boundaries and reapportionment. The court noted, citing Hunter v. City of Pittsburgh, 207 U.S. 161 (1907):

> Any alteration of municipal boundaries is a matter within the complete discretion of the state and not confined by any rights secured by the federal constitution. 247 F. Supp. at 299.

This comparison is highly appropriate, as school districts in Michigan have the same legal status as municipal corporations for many purposes. Marathon School District No. 4 v. Gage, 39 Mich. 484 (1878); Kent County Board of Education v. Kent County Tax Allocation Board, 350 Mich. 327, 86 N.W. 2d 277 (1957). Discussing reapportionment cases, the court in Detroit Edison, supra, pointed out:

> A state may not create electoral districts which have a population disparity. But this is the only limitation the cases place upon the legislative power of a state to define political boundaries. They create no constitutional rights in affected citizens concerning the procedure for creating or altering these districts.

> Even where the Court has held electoral district boundaries must be altered, it has failed to establish a specific procedure to accomplish this. Reynolds v. Sims, 377 U.S. 533, 585, 84 S.Ct. 1362, 12 L.Ed. 2d 506 (1964). Further, the cases have nothing to do with limited purpose districts, such as school districts.

247 F. Supp. at 301. On the annexation issue, the court concluded:

> The foundation on which the Hunter doctrine has stood for half a century on the issue of annexation procedure is as sturdy as ever. This court holds, therefore, that the school district annexation procedure of the Michigan School Code which was followed by the original East China district in forming the combined district, is a purely legislative matter. It is not justiciable under the due process or the equal protection clauses of the Fourteenth Amendment to the federal constitution.

Id. at 302. In affirming this decision, the court of appeals stated:

> However, as the District Court noted, the reapportionment cases "create no constitutional rights in affected citizens concerning the procedure for creating or altering" any type of state district. The judgment of the District Court with respect to the annexation issue will hereinafter be affirmed; reference is made to the well reasoned opinion of District Judge Theodore Levin reported at 247 F. Supp. 296.
> . . .

378 F. 2d at 229.

Since the annexation of school districts and the inter-district bussing of students have essentially the same practical effect, the holding and carefully reasoned opinion of the district court in that case is clearly applicable to the matter in question.

An examination of a series of reapportionment cases is quite instructive on the issue involved here. The traditional view was described by Justice Frankfurter in his opinion for the Court in Colegrove v. Green, 328 U.S. 549 (1946):

> We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our Government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

Id. at 552. This statement shows the respect held by the Supreme Court for the importance of declining to interfere with the working of a state legislature and that reasoning is equally applicable here. Justice Frankfurter went on to point out:

> In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in

order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.

Of course no court can affirmatively remap the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid.

Id. at 552-53.

On the point of the action required, that case was identical to the present case. The district court here has attempted to re-map school districts, by means of nullifying boundaries by inter-district bussing, and it should not be permitted to do so because of the principles described by Justice Frankfurter.

In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court did find an appropriate case for relief, distinguishing Colegrove v. Green, supra, as follows:

The decisive facts in this case, which at this stage must be taken as proved, are wholly different from the considerations found controlling in Colegrove.

That case involved a complaint of discriminatory apportionment of congressional districts. The appellants in Colegrove complained only of a dilution of the strength of their votes as a result of legislative inaction over

> a course of many years. The petitioners here complain that affirmative legislative action deprives them of their votes and the consequent advantages that the ballot affords.

Id at 346. That distinction is directly applicable in the instant case. In Gomillion, the Court struck down a re-drafting of boundaries. Any racial imbalance which exists among Michigan school districts is the result of population movement for socio-economic or personal reasons within a school district boundary structure which has been in existence for many years, rather than a result of any affirmative re-structuring of the boundaries.

A test for determining what is a non-justiciable political question was stated in Baker v. Carr, 369 U.S. 186 (1962):

> We come, finally, to the ultimate inquiry whether our precedents as to what constitutes a non-justiciable "political question" bring the case before us under the umbrella of that doctrine. A natural beginning is to note whether any of the common characteristics which we have been able to identify and label descriptively are present. We find none: The question here is the consistency of state action with the Federal Constitution. We have no question decided, or to be decided, by a political branch of government co-equal with this Court. Nor do we risk embarrassment of our government abroad, or grave disturbance at home if we take issue with Tennessee as to the constitutionality of her action here challenged. Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking.

Id. at 226 (emphasis supplied).

The instant case falls within the political question category as being the kind of case anticipated by the underlined portion of the above quotation. Since the creation of school district boundaries is not an activity of the judiciary, there are no judicial standards for so doing. However, this function is clearly within the expertise of the legislature, which can draw not only upon knowledge gained from experience in this activity, but can also rely upon knowledge gained from studying the needs and desires of the citizens of the state.

Another factor in determining whether this is a political question is pointed out in Reynolds v. Sims, 377 U.S. 533 (1964). In that case, in determining that a political question was not involved, the Court observed:

> No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available.

Id. at 553.

In that case, then, the Court felt compelled to give relief, since no other remedy was available. In the instant case, if the people of Michigan believe that school district boundaries should be altered, they have the opportunity to convey this belief to their elected representatives, and the legislature can make any appropriate alterations. As discussed above, and as noted in School District of City of Lansing v. State Board of Education, supra, the state legislature has the power to organize and

control school districts in the state, including the power to provide for the alteration of boundaries of school districts. Thus, it is entirely appropriate that this kind of action be taken by the legislature, not by the court.

The difficulty and delicacy of providing a judicial remedy in this type of situation was astutely noted by the district court in Strickland v. Burns, 256 F. Supp. 824 (M.D. Tenn. 1966). In that case a statute providing for apportionment for voting for members of school boards was challenged. The court held:

> We hold, therefore, that the discrimination existing is invidious. Since we can find no basis for applying the "one man, one vote" rule to the congeries of powers possessed by the Legislature itself and at the same time denying its application to a subordinate body simply because it possesses a fractional part of those powers, so long at least as the fractional part cannot be said to be insignificant or unimportant, we must also hold that the apportionment provisions of the Act complained of are void as violative of rights secured by the Equal Protection Clause of the Fourteenth Amendment.
>
> The provision of proper relief to implement this decision has given this court much concern. We believe that the formulation of a constitutionally acceptable method of selecting a board to administer the schools of the county is more properly a legislative function than a judicial one.

Id. at 827. As a result of its determination that this was a legislative function, the court declined to give the requested injunctive relief.

These authorities show very clearly, then, that a program of inter-district bussing of school children is not appropriately created by the judiciary, but rather such actions are the exclusive province of the legislature.

This was the decision in the factually similar case of Bradley v. School Board of the City of Richmond, 462 F. 2d 1058 (4th Cir. 1972), aff'd, 412 U.S. 92 (1973), which the Sixth Circuit Court of Appeals attempted to distinguish:

> We therefore conclude that the District Court in the present case is not confined to the boundary lines of Detroit in fashioning equitable relief.
>
> Bradley v. School Board of the City of Richmond is dintinguishable in several respects. In that case the District Court ordered an actual consolidation of three separate school districts all of which the Court of Appeals for the Fourth Circuit declared to be unitary in the instant case the District Court has not ordered consolidation of school districts but directed a study of plans for the reassignment of pupils in school districts comprising the metropolitan area of Detroit. In the Richmond case the court found that neither the Constitution nor statutes of Virginia, previously or presently in effect, would have permitted the State Board of Education, acting alone, to have effected a consolidation of the three school districts into a single system under the control of a single

> school board. The Fourth Circuit held that compulsory consolidation of political subdivisions of the State of Virginia was beyond the power of a federal court because of the Tenth Amendment to the Constitution of the United States. The decisions which now are under review did not contemplate such a restructuring.

484 F. 2d at 250-51. We respectfully contend that the Richmond case is not thus distinguishable. In Richmond the court had ordered a consolidation of school districts. In Milliken, inter-district bussing has been ordered. The labels are thus different, but the effect is the same. Administratively, there may be a difference, but in terms of attendance patterns the result is the same, and attendance patterns are the real issue in a desegregation plan.

It was pointed out that in the Richmond case, the State Board of Education was without authority to order the consolidation. This makes the instant case even stronger for rejection of the plan, for here there is an alternative remedy. As discussed supra, the Michigan legislature is fully empowered to take any action that is required.

II.

THE ORDER OF THE DISTRICT COURT IS INAPPROPRIATE IN THAT IT IS DIRECTED AT PARTIES WHO ARE WITHOUT THE AUTHORITY TO COMPLY WITH THE ORDER.

As clearly established in previous discussed, the Michigan legislature is solely responsible for the control of schools and school districts. None of the defendants in this matter have the authority to implement a plan of inter-district bussing as

suggested by the order of the district court. This principle was clearly established in Bradley v. School Board of City of Richmond, supra, and this conclusion is logically inescapable.

III.

ABSENT A SHOWING OF DE JURE SEGREGATION.. ERRONEOUSLY FOUND BY THE SIXTH CIRCUIT COURT OF APPEALS--THIS COURT WILL NOT RE-BALANCE THE RIGHTS OF PARTIES TO ACHIEVE EITHER A QUANTITATIVE OR A QUALITATIVE EQUALITY.

The United States Supreme Court has consistently held that classifications of people will not be struck down as offensive to the constitution merely because such distinctions among them are "not made with mathematical nicety or because in practice it results in some inequity." Dandridge v. Williams, 397 U.S. 471, 484 (1970). The Supreme Court has refused to rule on the fairness of a party's circumstances and instead exercises its power only when legislation is unreasonable or impinges on a fundamental right or creates a class which is inherently suspect. Substantive constitutional rights may not be made by the Court: "It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." San Antonio School District v. Rodriguez, 411 U.S. 1, 33 (1972)

Similar considerations are in effect when the issue of impermissible state action is litigated. Quite clearly the State may not overtly discriminate against a certain race whether in education, Brown v. Board of Education, 347 U.S. 483 (1954); or in

housing, Hunter v. Erickson, 393 U. S. 385 (1969). The Court has not, however, held that mere de facto segregation, even when important rights are involved, is enough to warrant the holding of an equal protection violation. In cases with facts most similar to the case at bar, the only discrimination found was unintentional and thus non-remediable by this Court.

A second consideration, even beyond the lack of obvious state action, would lead this Court to rule against the Sixth Circuit decision. Recent cases dealing with housing and property taxes and their reaction upon racial upward mobility have consistently analyzed the requested relief against the rights that would be impinged by a finding of an equal protection violation. The Supreme Court has recognized that certain "rights" so inherent in the people effected by any ruling, outweigh the social planning aspects of court decisions. Thus a right to vote, when expressed in a housing referendum, lead to a blocking of low income people into a certain city. Also the right to tax one's self for quality local schools, even though others less economically well off will be obviously prejudicial, has been upheld. The one constant in these cases is that as long as access is open to all no locality may be prejudicial for its own abundance. Thus, in a de facto racial segregation case, such as the one at bar, not only must the lack of affirmative state action call for a reversal but also the fact that the people truly at interest, those who live near the schools their children attend, are exercising a right favorably viewed by this Court in a number of contexts. Often they may move specifically to an area to have their children attend certain schools. They tax themselves to maintain and improve their

schools. Finally they have participation in an institution which desperately needs such attention. As unequal as the educational factor may be among the races in the Detroit Metropolitan Area these people should not be totally deprived of the school districts they have initiated and built in order to right an obvious social wrong. A holding to affirm the Sixth Circuit would place this Court in the realm of social planning and, more importantly, divest others of rights as important as any in our nation.

Even a cursory reading of cases on the subject conclusively shows how erroneous was the holding of the Sixth Circuit that the State has committed de jure acts of segregation by failing to affirmatively re-align the racial percentages in Detroit area schools. Bradley v. Milliken, 484 F. 2d 215, 249 (6th Cir. 1973). The basic findings to show state action were that school district lines were drawn to exclude blacks, housing circumstances are such that blacks usually may live only near certain schools and that school construction has been only to perpetuate this discrimination. Yet, as Weicks, J. correctly shows in his dissent, no finding of de jure discrimination has ever been held on these facts. This is especially so when the magnitude of the plan is imagined. Approximately three counties and over fifty school districts will be effected by any curative order.

The present Bradley decision conflicts with a great number of other school desegregation cases. In these cases on facts closely parallel to the instant case only de facto discrimination was shown with no affirmative order forthcoming from the courts. [Contrary to certain opinions the de facto/de jure distinction regarding school desegregation cases

is still very much viable as a concept. See Keyes v. School District No. 1, Denver, Colo., 413 U.S. 189, 208-14 (1972).] Quite confusingly the same questions in an identical conceptual framework were offered to the Sixth Circuit in Deal v. Cincinnati Board of Education, 419 F. 2d 1387 (6th Cir. 1969), cert. denied, 402 U.S. 962 (1971); Deal v. Cincinnati Board of Education, 369 F. 2d 55 (6th Cir. 1966), cert. denied, 389 U.S. 847 (1967). Although in Deal II the district court had not found de jure segregation on the part of the school district the court of appeals had the right to view the reasonableness of their determination. The court concluded, however, that the districting had to do with social causes beyond the control of the boards in charge: "Boards of Education can hardly be blamed or held responsible for neighborhood residential patterns." Deal v. Cincinnati Board of Education, supra, 419 F. 2d at 1392.

The most irreconcilable difference with Bradley comes in comparison with the recent decision of Spencer v. Kugler, 326 F. Supp. 1235 (D. N.J. 1971), aff'd, 404 U.S. 1027, with Douglas dissenting (1972). Under statutory law quite similar to Michigan's New Jersey had a unitary system of education. Thus none of the false discrimination patterns of cases like Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971), were relevant. In Spencer plaintiffs were blacks who claimed that all public schools in New Jersey were racially unbalanced. The request for relief was premised on a violation of equal protection. The Court, quite logically, found that any segregation could only be defined as de facto:

In none of the schools of which the plaintiffs complain is any black pupil "segregated" from any white pupil. Indeed, complaint is made that the blacks who reside in the school district served predominate over the whites, thus affording an example of complete desegregation which was the expressed object of the court in the Brown case. At page 487 of the Opinion at page 688 of 74 S. Ct. in Brown it is stated that:

> "In each of the cases [from Kansas, South Carolina, Virginia and Delaware] minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race."

Such is not the basis upon which each of the plaintiffs in the present case seeks relief in this cause. On the contrary plaintiffs would have a substantial portion of the pupils now in attendance in their respective schools ordered by the court removed from these schools and assigned to a school in another district. Alternatively plaintiffs would have the court abolish the respective districts in which the disproportion between white and black students is reduced in one direction or the other. If, as plaintiffs contend, the proportionate black attendance in their respective schools adversely affects the degree of excellence of education which they can receive there must be a point at which any excess of blacks over whites is

likely to impair the quality of the education available in that school for the black pupils. Nowhere in the Appendix filed by the plaintiffs or in the facts involved in any of the judicial precedents which they cite are we informed of the specific racial proportions which are likely to assure maximum excellence of the educational advantages available for the whites. Assuming further that efforts to achieve the ideal interracial proportion necessarily include the alteration of the population factor determinative of the redistricting, there can be no assurance that the population factor will remain static. If so, it would be necessary to successively reassign pupils to another district as the rate of births and graduations alters the racial proportions creating the demand for the educational facilities as it changes from term to term. In sum, the difficulty complained of does not amount to unconstitutional segregation.

326 F. Supp. at 1239-40. This is cited in Weick's dissent, Bradley, supra, 484 F. 2d at 261-62. The court in Spencer further noted that social dislocation, even when it resulted in racial imbalance in public schools, was not a ground for a ruling of a constitutional violation:

> A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention. The New Jersey Legislature has by intent maintained a unitary system of public education, albeit that system has degenerated to extreme racial imbalance in some school districts; nevertheless the statutes in question as they are presently constituted are constitutional.

Id. at 1243.

The majority in Bradley was apparently confused by the theoretical differences in cases like Swann v. Charlotte-Mecklenburg Board of Education, supra, and Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). In Swann, supra, an historical structure of mandatory separation of the races into dual educational systems was being corrected. The Supreme Court noted that it was this correction which gave the judiciary impetus to intervene:

> Absent a constitutional violation there would be no basis for judicially ordering assignment of students on a racial basis. All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation. . . . The objective is to dismantle the dual school system.

Id. at 28 (emphasis supplied). Similar considerations were evident in Wright, supra, when the Supreme Court struck down the City's attempt to create a separate school system. The new system would have served to impede the dismantling of the dual structure:

> The city's creation of a separate school system was enjoined because of the effect it would have had at the time upon the effectiveness of the remedy ordered to dismantle the dual system that had long existed in the area.

Id. at 470.

Quite clearly the discrimination evident in the Detroit area is a result of complex and largely mysterious social forces. Any finding of de jure state action based upon social change is clearly erroneous. The Bradley v. Milliken, supra, court should have made a finding that only de facto segregation existed.

Based upon findings of de facto segregation or of an unequal burden placed on a class by legislation the Supreme Court has analyzed the importance of rights involved. Even when dealing with subjects having important social weight, however, the Supreme Court has upheld certain rights or expectations inherent in the concept of a free people. The present case presents no situation to change this theoretical consistency.

A negative example may serve to clearly delineate the issue. In the cases of Hunter v. Erickson, supra, and Reitman v. Mulkey, 387 U.S. 369 (1967), the Supreme Court went through an obvious balancing act between the right to vote and the right to remain free from discrimination. In Hunter the Court invalidated an amendment to the Akron Fair HousingOrdinance because it made all attempts to regulate against racial discrimination in housing subject to voter approval. The burden could fall only on minorities. Other housing ordinances (not dealing with race) took effect without any special legislation. In Reitman the right to racially discriminate in the sale of real estate would have become part of the State of California's constitution. As such it would have been immune from regulation. The balancing of rights became much less of a problem when the Court was faced with such a pernicious outcome. These cases have been, however, the exception.

The Supreme Court has been careful to protect what may be termed the rights of social expectancy. Basically such rights are entwined with the ethic that an individual is free to pursue his life's calling where and when he chooses. Very often this ethic joins with a second body of theory, the majoritarian ethic. Thus a relatively wealthy individual may seek others similarly situated economically in order to form a community. Schools and other amenities of life may be structured and developed by them. Such people are also the voting majority of the municipality. At times what this majoritarian-individual rights ethic creates will inconvenience others by the fact that these others do not enjoy the same advantages created by the majority. When such cases have come before this Court the conclusions delivered have almost unanimously concurred in the actions of the controlling majority.

The problems facing the Court regarding conflicts in the above areas have, of course, been more complex than the abstract model. Increasingly those disadvantaged, even without any overt state action, are the members of a single racial class. Thus every claim of an economic or social denial becomes, at its core, a charge of racial discrimination. The Supreme Court has not, however, seen fit to lessen its grasp of what is truly at stake in such situations. The right to attend a certain school or a certain school district, as well as to live in a certain city, carries with it a price tag. Such a cost affects both parties at interest.

The first cost refers to the constant open ladder of social mobility which must be kept open. Thus the controlling ethic may not absolutely block any rise up the ladder by a member of an undesired race.

The second cost, however, is the true crux of the myriad of cases which have come before the Supreme Court on an equal protection theory. The majoritarian control group has the inherent right to determine their own individual and collective destinies. Those socially less fortunate may move into this control group but only as they individually rise. The Court has refused to become a tool for social change. To do so would strongly burden those who do more to an area specifically for the benefit of its schools, homes or jobs. The benefit to socially deprived groups would not be equal to the strain of dislocation formed if equality in fact became the norm by which the Supreme Court would have to judge each case. A quick review of recent cases will amply demonstrate this balancing test presently used by the Supreme Court.

The point has continually been made that housing is a prime component in the elevation of disadvantaged races. Often better living conditions, better schools and jobs follow the construction of new (usually suburban) housing. It would therefore seem--if the equality ethic were dominant--that the judiciary would consistently defeat any attempts to remove these affluent areas from control by the majoritarian ethic. Such is not, however, the case. In James v. Valtierra, 402 U.S. 137 (1970), the Supreme Court upheld California's Article XXXIV which made a referendum necessary for all low-rent public housing projects. Quite clearly minorities would have their ability to enter these places of a better existence curtailed by the right of the people to vote against public housing. Justice Black, who dissented in Reitman, supra, wrote the majority opinion which held that "provisions for referendums demonstrate devotion to democracy,

not to bias, discrimination or prejudice." James v. Valtierra, supra, 402 U.S. at 141. Most importantly, however, was the control over their own lives the majority opinion understood as the central reason to uphold the referendum:

> This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will effect the future development of their own community.

Id. at 143 (emphasis supplied). The cap was put upon this theory when in Lindsey v. Normet, 405 U.S. 56 (1972), upon the complaint of tenants that they were in danger of being evicted under an unconstitutional statute, the Supreme Court noted that housing was not a constitutional right. Id. at 74. Thus, neither the right to equal housing nor the right to adequate housing per se is guaranteed by the constitution.

Following such a conceptual trail was the decision of San Antonio School District v. Rodriguez, supra. In Rodriguez the Court upheld the right of local school districts to be funded in the traditional manner of local property taxes. The importance of this decision cannot be overstated because it directly controls the considerations which should be used in deciding the instant case.

The Rodriguez Court offered a very broad opinion with two main points each of which further affirms the theory posited above. The first point is that where a deprivation is based upon wealth no remedy will be available unless a complete deprivation is evident:

> The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.

Id. at 20. Thus if no de jure segregation is found no claim may be made that those allegedly discriminated against were without any adequate schools.

The second point was one echoed in James, supra, and Wright, supra: the participation in one's own local affairs:

> The Texas system of school finance is responsive to these two forces. While assuring a basic education for every child in the State, it permits and encourages a large measure of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." Id., at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but

it is of overriding importance from an educational standpoint as well." Id., at 478.

The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. Equally important, however, is the opportunity it offers for participation in the decision-making process that determines how those local tax dollars will be spent. Each locality is free to tailor local programs to local needs. Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public education.

Rodriguez, supra, 411 U.S. at 49-50. Thus a distinct premium is placed upon the right of the majority to control the pace and direction of their own lives. Minus an obvious discrimination against a racial group, courts will not seek to balance "natural" social inequalities.

These same considerations have echoed throughout past school desegregation cases. No one has been held to have the right to an educational

experience offered to another family that exists in another town. Whether a group is discriminated against due to their poverty even when associated with race as long as no overt (de jure) discrimination is the cause of a lack of social amenities, no constitutional cause of action will be found. The rule put forth in Deal I, supra, is still good law:

> We hold that there is no constitutional duty on the part of the Board to bus Negro or white children out of their neighborhoods or to transfer classes for the sole purpose of alleviating racial imbalance that it did not cause, nor is there a like duty to select new school sites solely in furtherance of such a purpose.

Id. at 61. To hold otherwise in the instant case would be to seriously infringe upon the right of people to affirmatively structure their own lives. A legislative answer is quite obviously needed for this problem. To remove the right of people to live near the schools to which they wish to send their children, and which may have been the reason for their move there initially, would be to severely retard involvement in local affairs, and more importantly it would restrict majoritarian control. Clearly past decisions have not sought such a solution to complex social problems.

CONCLUSION

A desegregation order that in effect reorganizes local units of government is violative of the basic constitutional principle of federalism. The failure of the order to recognize the reservation of powers to state government not only undermines such government abstractly but negatives local democracy and home rule.

In the United States local self-government has been a tradition since colonial times. Indeed, the democracy of many counties, towns, cities, villages and school districts ante-date the democracy of the several states and of the federal government. Many of the states of the union have adopted constitutional provisions allowing local units of government to reshape their own charters by the adoption of charter ordinances. New Orleans Waterworks Co. v. New Orleans, 164 U.S. 471 (1896); Walla Walla vs. Walla Walla Water Co., 172 U.S. 1 (1898). The American tradition favoring local democracy is so strong that within the last two decades the majority of people in metropolitan areas have gravitated to suburban communities where their personal participation in local government is close, direct and meaningful. This pattern of government is precisely the pattern envisaged by the federal constitution in reserving nondelegated powers to the states and the people. X Amendment, Constitution of the United States. Knapp vs. Schweitzer, 357 U.S. 371 (1958); United States v. Butler, 297 U.S. 1 (1936). The goal of desegregation should not be used as a cloak to disguise a violation of local autonomy established by state authority.

It has been fashionable in the last two decades to ignore the 10th Amendment. However, it is the cornerstone of local autonomy for states and municipalities. It must once again be acknowledged and revitalized. If the rulings of the district court and the court of appeals are upheld the Amendment will be violated.

For the stated reasons the decision of the Sixth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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